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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON
9 (HONORABLE THOMAS O. RICE)

10 UNITED STATES OF AMERICA,)
11) 2:CR-19-170-TOR
12 Plaintiff,)
13 vs.) RESPONSE TO PRESENTENCE
14) INVESTIGATION REPORT
15 NORMAN CLARY,)
16)
17 Defendant.)
18 _____)

19 NORMAN CLARY, through counsel, Stephen R. Hormel for Hormel Law
20 Office, LLC, submits the following response to the Presentence Investigation
21 Report:

22 **Objection # 1 - Offense Conduct - ECF No. 43 at 7-8, ¶ 24.**

23 The PSI states “Norman Clary admitted to having direct access to the
24 detached garage where law enforcement discovered the following firearms:”

25 a) Harrington and Richardson, model Topper, 12-gauge
26 shotgun, bearing serial number BB415085;

27 b) Weapon made from a Shotgun, approximately 21
inches full length, 13-inch barrel, unknown manufacturer

1 (Stevens), model Ranger 101.6, 20-gauge shotgun,
2 bearing serial number 22879;

3 c) Ruger, New Model Single Six, .22 caliber revolver,
4 bearing serial number 262-29230;

5 d) New England Arms Co. model Pardner SB-1,
6 12-gauge shotgun, bearing serial number 341913;

7 e) Marlin, model 60, .22 caliber rifle, bearing serial
8 number 96401276;

9 f) Ruger, model M77, .270 caliber rifle, bearing serial
10 number 77267668;

11 g) Browning, model BAR II., 270 caliber rifle with
12 scope, bearing serial number 107NT01480;

13 h) Savage, model 170, 30-30 caliber pump action rifle,
14 bearing serial number A499875;

15 i) Marlin, model 60, .22 caliber rifle, bearing serial
16 number 12400411; and

17 j) Savage/Stevens, model 15, unknown caliber rifle,
18 bearing no serial number.

19 Clary was interviewed twice by Detective Ledeboer and Officer Ramirez of
20 the Moses Lake Police Department. Attachment at 1-10.¹ In a second interview,
21 Mr. Clary admitted to the officers he had access to firearms in the detached garage.
22 The report from the Moses Lake Police Department states:

23 The following items were taken from the detached
24 garage which Norman Clary admitted having direct
25

26 ¹ The Attachment will be filed under seal since it is discovery.
27

1 access to :

2 Harrington and Richardson shotgun

3 Remington 22 caliber bolt action rifle inside safe

4 Benelli 12 gauge shotgun inside safe

5 Ruger revolver 22 caliber in black case on south wall

6 New England Arms shotgun 12 gauge in a black tote on south wall

7 Marlin 22 caliber rifle model 60 in black case on south wall

8 Ruger bolt action rifle 270 caliber found in black tote on south wall

9 Semi automatic 270 rifle browning brand found in black tote on
10 south wall

11 Savage Model 170 pump action rifle found in a black
12 tote on south wall

13 Marlin model 60 22 caliber semi automatic rifle found in
14 a black rifle case on south wall

15 Attachment at 7-8.

16
17 The list of firearms Clary admitted to having access does not include the
18
19 “[w]eapon made from a Shotgun, approximately 21 inches full length, 13-inch
20 barrel...” and he denied knowledge of the Savage/Steven as referenced in ¶ 24 of
21 the PSI. Clary denied knowledge of the other firearms located in the detached
22 garage. Attachment at 7.
23

24 It is requested that the statement of facts strike the list of firearms currently
25 in ¶ 24, and include the list from detective Ledebor’s report. He conducted the
26
27

1 interviews with Clary. It makes a significant difference in calculating the base
 2 offense level, and an enhancement, as set out below.

3 **Objection # 2 - Base Offense Level ECF No. 43 at 11, ¶ 43 & Destructive Device**
 4 **2 Level Enhancement ECF No. 43 at 11, ¶ 45.**²

6 The PSI sets a base offense level of 20 on the basis that Clary's offense
 7 involved a firearm described in 26 U.S.C. ¶ 5845(a), the Stevens short barreled
 8 shotgun. (ECF No. 43 at 11, ¶ 43).³ As set forth above, this firearm is not
 9 contained in the list of firearms determined by the interviewing officers to be
 10 attributed to Clary due to his statement that he had access specified firearms, and
 11 denied knowledge of the other firearms in the detached garage. Attachment at 7-8.
 12
 13

14 _____
 15 ² The objection combines both the base offense level and the destructive
 16 device enhancement since both rests on the same set of facts. In addition, the
 17 combination of the two increases in the total offense level bases on these facts require
 18 a clear and convincing standard of proof because of the huge impact they have in
 19 combination for increasing Clary's sentencing guideline range.
 20

21 ³ Paragraph 43 also lists a .22 caliber Savage Arms, Inc., Stevens Model 62.
 22 This firearm is not a firearm as described in 26 U.S.C. § 5845(a). It is the firearm that
 23 forms the factual basis for Count 1, the count Clary pleaded guilty to pursuant to the
 24 plea agreement. (ECF No. 5 at 1).
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 26
 27

1 The circumstances in this case are similar to the circumstances in *United*
2 *States v. Cazares*, 121 F.3d 1241 (9th Cir. 1997). In *Carzares*, the Ninth Circuit
3 found evidence insufficient to establish possession of firearms. *Id.* at 1245-46.
4
5 The Ninth Circuit held contrary to the district court's finding of possession,
6 stating,

7 The findings of the district court were clearly
8 erroneous. Parra Cazares was only one of a number of
9 residents of the apartment, and the government has not
10 contended that the other residents of the apartment were
11 members of the conspiracy. The government did not
12 offer facts to support a finding that Parra Cazares knew
13 of the guns' existence or was in any way connected with
14 them, by ownership, fingerprints, or otherwise. It did not
15 even prove that the guns were found in the bedroom
16 occupied by Parra Cazares. On the record below, it
17 cannot be found by a preponderance of the evidence that
18 Parra Cazares, rather than any of the other occupants
19 (who are not alleged to be co-conspirators), had
20 possession of the weapons. Accordingly, we VACATE
21 the sentence and REMAND for resentencing.

22 *Id.*

23 The particular shotgun in questions was located in a detached garage. At
24 least four other individuals resided at that property, including Clary's father and
25 sister. Clary denied knowing of this particular firearm and no other information
26 connects him to that firearm other than his ability to access the detached garage
27 where other firearms were located. These circumstances are insufficient to
establish possession of the short-barreled shotgun.

1 *Cazares*, is distinguishable in one important aspect. In *Cazares*, the Ninth
 2 Circuit applied the preponderance of evidence standard. The 6 level increase in
 3 the base offense level requires a clear and convincing standard of proof. It is also
 4 required when the offense level is also enhanced by 2 levels for possession of a
 5 destructive devise under U.S.S.G. § 2K2.1(b)(3)(B). *See, United States v. Valle*,
 6 940 F.3d 473 (9th Cir. 2019).

7
 8
 9 *Valle* sets out the general test for determining when the clear and
 10 convincing standard of proof at sentencing is required. *Id.* at 479. This test is
 11 summarized in *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001). The test is:

12
 13 (1) whether the enhanced sentence falls within the
 14 maximum sentence for the crime alleged in the
 15 indictment; (2) whether the enhanced sentence negates
 16 the presumption of innocence or the prosecution's
 17 burden of proof for the crime alleged in the indictment;
 18 (3) whether the facts offered in support of the
 19 enhancement create new offenses requiring separate
 20 punishment; (4) whether the increase in sentence is
 21 based on the extent of a conspiracy; (5) whether the
 22 increase in the number of offense levels is less than or
 23 equal to four; and (6) whether the length of the enhanced
 24 sentence more than doubles the length of the sentence
 25 authorized by the initial sentencing guideline range in a
 26 case where the defendant would otherwise have received
 27 a relatively short sentence.

28 *Valle*, 940 F.3d at 479 (quoting *Jordan*, 256 F.3d at 928).

29 *Valle* recognized that the first four factors are not very helpful in the
 30 equation. *Valle*, 940 F.3d at 479. Ninth Circuit decisions are favoring a test that

1 relies heavily on the last two factors, the number of level increase and if the
2 increase more than doubles the sentencing range. *Id.* at 479-80.

3
4 In this cases the 6 level increase in the base offense level, coupled with the
5 2 level increase adds 8 levels to the base offense level. Without consideration of
6 any other adjustments, the guideline range is increased from 15 to 21 months to 41
7 to 51 months.

8
9 Here the parties have stipulated to a 2 level increase because a firearm was
10 stolen. (ECF No. 37 at 5). Additionally, the parties are recommending a 3 level
11 decrease for acceptance of responsibility. *Id.* at 5-6. If 4 levels are added for
12 number of firearms, an 8 level increase for the short-barreled shotgun would result
13 in a sentencing range of 46 to 57 months from a 24 to 30 month range, resulting a
14 a high-end range more than double than the low end of 24 months.

15
16 In this case, the clear and convincing standard of proof should apply.
17
18 However, as in *Cazares*, even under a preponderance of evidence standard of
19 proof, the evidence is not sufficient to justify enhancing the base offense level, nor
20 sufficient to apply the destructive device enhancement.

21
22 Therefore, it is requested that the Court set the base offense level at the
23 agreed level in the plea agreement, a base offense level of 14. (ECF No. 37 at 5).

24 **Objection # 3 - Obstruction of Justice ECF No. 43 at 11, § 49.**

25 The PSI concludes that an obstruction of justice 2 level enhancement should
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1 apply based on the following:

2 Sometime between August 28 and September 11, 2019,
 3 Mr. Clary went to the property where the CI was staying
 4 and, while he/she was sleeping, threatened him/her
 5 through another individual. This individual had a close
 6 relationship with the CI and told the CI's significant
 7 other that the defendant had gone to the property and
 8 asked to see the firearm the CI had purchased from him.
 9 Mr. Clary then told the individual if the CI did not show
 10 him the firearm later that day, the CI would have
 11 problems. Additionally, the CI heard through friends that
 12 Mr. Clary would put a hit out on him/her if the cops ever
 13 showed up to his house. He told the CI's friends he
 14 would say the CI brought the rifle to his house and he
 15 did not sell the CI the rifle.

16 (ECF No. 43 at 9, ¶ 35).

17 These facts contain multiple layers of hearsay. First, an unknown friend of
 18 the CI's unnamed significant other, apparently told the CI's unnamed significant
 19 other, who then told the CI, who then told the agent, who then passed this multi-
 20 layered hearsay to the prosecutor.

21 Generally, the Confrontation Clause does not apply at a sentencing hearing.
 22 *United States v. Vera*, 893 F.3d 689, 692 (9th Cir. 2018). However, information
 23 sought to be considered by the district court must have a "sufficient indicia of
 24 reliability to support its probable accuracy." *Id.* (quoting U.S.S.G. § 6A1.3(A)).
 25 Thus, "a trial court violates a defendant's due process rights by relying upon
 26 materially false or unreliable information at sentencing." *United States v. Hanna*,
 27 49 F.3d 572, 577 (9th Cir.1995). Furthermore, "a district court abuses its

1 discretion whenever it relies on materially false or unreliable information at
 2 sentencing.” *United States v. Hernandez*, 795 F.3d 1159, 1166 (9th Cir. 29015)
 3 (citing *Hanna*, 49 F.3d at 577).
 4

5 Nothing in the report indicates any minimal indicia of reliability to support
 6 the accuracy of the information from CI. The information apparently came from a
 7 friend, who heard from a friend, who heard from a friend. *See, United States v.*
 8 *Pimentel-Lopez*, 859 F.3d 1134, 1144 (9th Cir. 2016) (“hearsay statements have
 9 not been ‘sufficiently corroborated ... to provide the minimal indicia of reliability
 10 necessary to qualify the statements for consideration by the district court during
 11 sentencing’”) (quoting *United States v. Berry*, 258 F.3d 971, 977 (9th Cir. 2001));
 12 *see also, United States v. Fennell*, 65 F.3d 812, 814 (10th Cir. 1995) (“Unsworn
 13 out-of-court statements made by an unobserved witness and unsupported by other
 14 evidence form an insufficient predicate for a sentence enhancement...”);
 15
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18 Therefore, the 2 level enhancement for obstructing should not apply.

19 **Objection # 4 - Base Offense Level Should Be Decreased to 6.**

20 Without application of base offense level 20, the Court may apply U.S.S.G.
 21 § 2K2.1(b)(2). That section specifies that a defendant whose base offense level is
 22 14 or less may qualify for a reduced offense level of 6 if the defendant possessed
 23 “all ammunition and firearms solely for lawful sporting purposes or collection, and
 24 did not unlawfully discharge or otherwise unlawfully use such firearms or
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 26
 27

1 ammunition...” U.S.S.G. § 2K2.1(b)(2).

2 Here, the evidence shows that Clary had a collection of firearms. The only
3 firearm he discharged was the firearm sold to the CI, target practicing to show the
4 CI the firearm worked. The evidence here establishes that Clary possessed the
5 firearms solely for sporting purposes, and/or for collection.

6 An offense level of 6, decreased to 4 for acceptance of responsibility, results
7 in a guideline range of 0 to 6 months in jail. Since Mr. Clary has already served
8 over 6 months in the Spokane County Jail, it is requested that the Court impose a
9 credit for time served sentence.

10 Should the Court not apply the 6 level offense level, then it is requested that
11 the Court calculate a base offense level of 14; increase the offense level to no
12 more than 18 for number of firearms; increase by 2 levels for a stolen firearm; and
13 reduce the offense level of 20 by 3 levels for acceptance of responsibility. This
14 results in a total offense level of 17.

15 In criminal history category I, the resulting guideline range is 24 to 30
16 months in prison. It is requested that the Court impose no more than a 24 month
17 term in prison.

18 In addition, Mr. Clary was arrested on October 3, 2019. He was taken into
19 federal custody on November 5, 2019. (ECF No. 43 at 3, ¶ 5). The companion
20 State charges were dismissed. It is requested that the Court ensure that Mr. Clary
21

1 receive credit for time served from October 3, 2019. It is unclear if he will receive
2 the 33 days in custody under BOP calculations since he was not in federal custody
3 until November 5, 2019.
4

5 Dated: June 21, 2020.

6 Respectfully Submitted,
7

8 s/ Stephen R. Hormel

9 WSBA #18733

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16
17

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on June 21, 2020, I electronically filed the foregoing
20 with the Clerk of the Court using the CM/ECF System which will send
21 notification of such filing to the following: Caitlin Baunsgard, Assistant United
22 States Attorney.
23

24 s/ Stephen R. Hormel

25 WA 18733
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